CH'NG GAIK KIEW

v.

ANG TEK BU @ ANG TEIK BOO

HIGH COURT MALAYA, ALOR SETAR
TUAN MOHD HISHAMUDIN MOHD YUNUS J
[ORIGINATING SUMMONS NO. 24-1232-95]
7 MARCH 1996

FAMILY LAW: *Section 103 Law Reform (Marriage and Divorce) Act 1976 - Application for interim restraining order against spouse - No petition for divorce or judicial separation filed - Matrimonial dispute referred to marriage tribunal under s. 106(3)(b) of the Act - Preliminary issue - Whether reference to a marriage tribunal is a matrimonial proceeding for the purposes of s. 103.*

WORDS & PHRASES: *"Pendency" - "Matrimonial proceeding" - Section 103 Law Reform (Marriage and Divorce) Act 1976.*

The plaintiff applied for an *ex parte* interim order to restrain her spouse, the defendant, from harassing and assaulting her pursuant to s. 103 of the Law Reform (Marriage and Divorce) Act 1976 (the Act). The parties were married on 1 December 1969 and the plaintiff had at the time of the present application not filed for divorce or a judicial separation but had referred the matrimonial dispute to the marriage tribunal which had issued a certificate pursuant to s. 106(3)(b) of the Act. The question arose as to whether the Court had the power to grant the application as the Court's jurisdiction under s. 103 was stated to be "during the pendency of any matrimonial proceedings". Counsel for the plaintiff submitted that although no petition for either divorce or judicial separation had been filed, there was a pendency of matrimonial proceedings as the plaintiff had referred her matrimonial difficulty to the marriage tribunal.

The preliminary issue before the Court was therefore whether a reference to a marriage tribunal under s. 106 of the Act is a matrimonial proceeding for the purposes of s. 103.

Held:

In the present case, there is no pendency of any matrimonial proceeding. The term "matrimonial proceeding" is not meant to include reference of a matrimonial difficulty to the marriage tribunal. For the purposes of s. 103, a matrimonial proceeding is commenced only when the spouse files a petition for divorce or for judicial separation, or for a decree of nullity of marriage.

[Application dismissed]

Case referred to:
Tan Keok Yin v. Cheah Saw Hong [1991] 2 MLJ 266 ***(not foll)***

Legislation referred to:
Divorce and Matrimonial Proceedings Rules 1980, r. 2
Law Reform (Marriage and Divorce) Act 1976, s. 103, 106(3)(b)

Other sources referred to:
Jowitt's Dictionary of English Law

For the applicant - Khoo Soo Eng; M/s. Khoo Soo Eng

JUDGMENT

Mohd Hishamudin Mohd Yunus J:

This is an *ex parte* application by the plaintiff for an interim order to restrain her spouse, the defendant, from harassing her. This application is made pursuant to s. 103 of the Law Reform (Marriage and Divorce) Act 1976 (hereinafter referred to as "the Act"). The couple were married on 1 December 1969. Hitherto, the plaintiff has not filed any petition for divorce or judicial separation. But she had referred her matrimonial difficulty to the marriage tribunal and a certificate has been issued by the tribunal pursuant to s. 106(3)(b) of the Act.

Section 103 states:

> 103. **Injunction against molestation.**
>
> The Court shall have power **during the pendency of any matrimonial proceedings** or on or after the grant of a decree or divorce, judicial separation or annulment, to order any person to refrain from forcing his or her society on his spouse or former spouse and from other acts of molestation. [Emphasis added]

"Pendency" is not defined in the Act but the meaning of the term is given in *Jowitt's Dictionary of English Law* as follows:

> **Pendency.**
>
> An action, arbitration or other proceeding is said to be pendent after it has been commenced and before the final judgment or award has been given. Pendency is the state of being pendent.

In view of the words "during the pendency of any matrimonial proceedings" in the provision of s. 103, and bearing in the mind meaning of "pendency" given above, at the outset of the hearing,

I indicated to Encik Khoo Soo Eng, the learned Counsel for the plaintiff, my opinion that, in the absence of any grant of decree of divorce or judicial separation, the Court's power to grant the order prayed for would depend upon the pendency of a matrimonial proceeding. Encik Khoo concurs with this interpretation. He, however, submits that, although no petition for either divorce

or judicial separation has been filed, there is, nevertheless, a pendency of a matrimonial proceedings by reason of the fact that the plaintiff had referred her matrimonial difficulty to the marriage tribunal; and in support of the stand that he takes, learned Counsel cites *Tan Keok Yin v. Cheah Saw Hong* [1991] 2 MLJ 266.

Thus, the preliminary issue before the Court is whether a reference to a marriage tribunal under s. 106 is a matrimonial proceeding for the purposes of s. 103.

Section 106 of the Act provides:

106. Requirement of reference to conciliatory body before petition for divorce

(1) No person shall petition for divorce, except under ss. 51 and 52, unless he or she has first referred the matrimonial difficulty to a conciliatory body and that body has certified that it has failed to reconcile the parties:

Provided that this requirements shall not apply in any case:

(i) where the petitioner alleges that he or she has been deserted by and does not know the whereabouts of his or her spouse;

(ii) where the respondent is residing abroad and it is unlikely that he or she will enter the jurisdiction within six months next ensuing after the date of the petition;

(iii) where the respondent has been required to appear before a conciliatory body and has willfully failed to attend;

(iv) where the respondent is imprisoned for a term of five years or more;

(v) where the petitioner alleges that the respondent is suffering from incurable mental illness; or

(vi) where the court is satisfied that there are exceptional circumstances which make reference to a conciliatory body impractical.

(2) A matrimonial difficulty may be referred to any conciliatory body acceptable to both parties but, where they are unable to agree on a conciliatory body, shall be referred to the marriage tribunal for the area in which they reside or, where they are living in different areas, to the marriage tribunal for the area in which they had last resided together.

(3) A "conciliatory body" means:

(a) a council set up for the purposes of reconciliation by the appropriate authority of any religion, community, clan or association; or

(b) a marriage tribunal; or

(c) any other body approved as such by the Minister by notice in the Gazette.

(4) A marriage tribunal shall be set up for such specified area or district as the Minister may decide, consisting of a Chairman and not less than two nor more than four other members who shall be nominated by the Minister, or by such officer to whom the Minister may have delegated his powers to in that behalf.

(5) (a) A conciliatory body to which a matrimonial difficulty has been referred shall resolve it within the period of six months from the date of reference; and shall require the attendance of the parties and shall give each of them an opportunity of being heard and may hear such other persons and make such inquiries as it may think fit and may, if it considers it necessary, adjourn its proceedings from time to time.

(b) If the conciliatory body is unable to resolve the matrimonial difficulty to the satisfaction of the parties and to persuade them to resume married life together, it shall issue a certificate to that effect and may append to its certificate such recommendations as it thinks fit regarding maintenance, division of matrimonial property and the custody of the minor children, if any, of the marriage.

(c) No advocate or solicitor shall appear or act as such for any party in any proceeding before a conciliatory body and no party shall be represented by any person, other than a member of his or her family, without the leave of the conciliatory body.

The term "matrimonial proceeding" is nowhere defined in the Act except in rule 2 of the Divorce and Matrimonial Proceedings Rules 1980 where it merely states:

> "Matrimonial proceedings" means any proceedings with respect to which rules may be made under s. 108 (1) of the Act;

but this definition is of no assistance, and, in any event, it is only for the purpose of the subsidiary legislation in question.

With respect to learned Counsel, I am of the opinion that, in the present case, there is no pendency of any matrimonial proceeding. I think the term "matrimonial proceeding" is not meant to include reference of a matrimonial difficulty to the marriage tribunal. To my mind, for the purposes of s. 103, a matrimonial proceeding is commenced only when a spouse files a petition for divorce, of for judicial separation, or for a decree of nullity of marriage. `I find support for such a view on the wording of s. 103 itself; for, it is to be noted that immediately following the words "pendency of any matrimonial proceedings" are the words "or on or after the grant of a decree of divorce, judicial separation or annulment,". These latter words strongly suggest that the

term "matrimonial proceedings" is not intended to be given a wide meaning but should be confined only to suits for divorce, nullity of marriage and judicial separation. With due respect, the case of *Tan Keok Yin* has no bearing on the present case, for there the issue was entirely different. That case concerns a petition of divorce by a husband on the ground that the marriage had broken down irretrievably as the parties had lived apart for a continuous period of a least two years. The interpretation of either s. 103 or s. 106 was not at all in issue. What was in issue in that case was whether the marriage had irretrievably broken down. Indeed, learned Counsel, in referring to *Tan Keok Yin*, is merely relying on the scant fact that in the judgment of Lim Beng Choon J, there is mention of the fact that, about seventeen months before the filing of the petition, an injunction had been applied for by the petitioner, and granted by the Court, to restrain the wife from assaulting, molesting or annoying him; however, from the judgment, it is not clear whether the injunction was made under s. 103 and whether at the time it was applied for there has already been a reference by the applicant to the marriage tribunal.

This application is, therefore, dismissed.

Reported by L Nagarajan